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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN FRANKLIN PHILLIPS IV, Defendant and Appellant.	E054752 (Super.Ct.No. SWF1101287) OPINION

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge. Affirmed with directions.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Benjamin Franklin Phillips, IV, appeals after he pleaded guilty to one count of committing a lewd and lascivious act on a child under

age 14. (Pen. Code, § 288, subd. (a).) Defendant was sentenced to six years in state prison. On appeal, defendant raises issues affecting the sentencing: first, he argues that he should have been awarded one additional day of presentence custody credit (actual days). Second, he contends that the evidence was insufficient to support the court's order that he pay a booking fee of $414.45.

Defendant is entitled to the additional day of presentence custody credit, but he agreed to the booking fee as part of his plea bargain. We order the matter remanded with directions to recalculate defendant's presentence custody credits, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In May 2011, defendant (age 65) and his wife were living temporarily with other relatives. Among the members of the household were three children, including six-year-old Jane Doe. On or about May 21, 2011, Jane Doe reported to her parents that defendant had touched her, and showed them how defendant had rubbed her vagina with his hand. The parents called law enforcement, who came and arrested defendant.

At the station, defendant waived his constitutional rights and agreed to talk to the deputies. At first, defendant denied touching the victim, or explained it away as accidental touching while roughhousing, but eventually admitted, "I touched her once and that was it. I'll be honest with you." Defendant made other admissions during the course of the interview, indicating that he had possibly touched the child more than once.

Defendant ultimately changed his plea; pursuant to a plea bargain he pleaded guilty to one count. The terms of the bargain were that defendant would receive no more than six years in state prison, and the trial court would exercise its discretion to determine whether defendant should be granted probation. Defendant argued that he was eligible for probation, and several family members wrote letters to the court asking that defendant be granted probation.

The trial court considered the probation report and a psychological report, but denied probation and sentenced defendant to six years in state prison.

Defendant has now appealed, identifying two issues relevant to sentencing.

ANALYSIS

I. Defendant Should Be Credited with One Additional Day of Presentence Custody Credit

When defendant was sentenced, the trial court awarded him credit for 83 days of actual custody, plus 15 percent conduct credits, or a matter of 12 days. Defendant contends that the trial court erred in counting the number of actual custody days to be awarded: defendant was taken into custody (day of arrest) on May 21, 2011, and remained in custody until the day of sentencing, August 12, 2011. Any portion or fraction of a day counts as a "day" for purposes of Penal Code section 2900.5. (See *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Counting both the first day of custody and the last day, defendant was in presentence custody for 84 days, not 83. His 15 percent conduct custody credits remain at 12 days.

The People concede that defendant should be credited with one additional day of presentence custody credit.

II. The Booking Fee Was Properly Imposed

Defendant raises an additional challenge: he urges that the evidence was insufficient to support the imposition of the booking fee of $414.45. Defendant contends that the authorizing statute requires that the booking fee not exceed the "actual . . . costs" to the local governmental entity where a defendant has been arrested and booked, but there was no evidence before the trial court to establish the actual cost to the entity.

Government Code sections 29550, 29550.1 and 29550.2 concern fees for booking or otherwise processing arrested persons into a county jail. Government Code section 29550, subdivision (a)(1), provides that, "a county may impose a fee upon a city [or other local entity] for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city [or other local agency] where the arrested persons are brought to the county jail for booking or detention. The fee imposed by a county pursuant to this section shall not exceed the actual administrative costs, including applicable overhead costs . . . incurred in booking or otherwise processing arrested persons." Government Code section 29550, subdivision (c), provides: "[a]ny county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the

offense for which the person was originally booked. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons." Government Code section 29550.1 states that, "[a]ny city . . . whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person." Government Code section 29550.2, subdivision (a), provides that "[a]ny person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550. 1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs . . . incurred in booking or otherwise processing arrested persons. If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person."

Government Code section 29550, subdivision (c), applies to booking fee orders when a defendant has been arrested by a county law enforcement agency. Government Code section 29550.1 applies when a defendant has been arrested by a local law enforcement agency, and booked into a county jail. Government Code section

29550.2 applies when a defendant has been arrested by an agency which is neither a county agency, nor a local agency, such as a state agency, e.g., the California Highway Patrol.

Defendant urges that the court's order in his case was based on Government Code section 29550, subdivision (c), because he was arrested by the Riverside County Sheriff. The Attorney General does not dispute that Government Code section 29550, subdivision (c), was the basis for the trial court's booking fee order.

As a first line of defense, the Attorney General argues that defendant forfeited or waived the claim by failing to object below. The forfeiture argument has arisen in other booking fee cases, where the defendant argued that a booking fee order was improper because there was no evidence on the record concerning the defendant's ability to pay such a fee.

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, the court held that the failure to object to a booking fee under Government Code section 29550 or 29550.2 does not forfeit the issue on appeal if the challenge is to the sufficiency of the evidence of the defendant's ability to pay. Sufficiency of the evidence to support a ruling is not subject to the rule that failure to object will foreclose review. (*Id*. at p. 1397, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217; see also *People v. Butler* (2003) 31 Cal.4th 1119, 1126.) "Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception." (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.)

A split of authority has developed, however, with respect to the necessity to object to orders imposing various fees in criminal cases. Even *People v. Butler*, *supra*, 31 Cal.4th 1119, on which defendant relies, was a very limited case. *Butler* did not involve a belated challenge to the imposition of a fee at sentencing. Rather, the court had ordered the defendant in that case to submit to HIV/AIDS testing. Penal Code section 1202.1, subdivision (e)(6)(A), the provision applicable in *Butler*, requires that defendants convicted of certain enumerated sex crimes must submit to AIDS testing; they must do so when the trial court makes a finding of "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." The trial court in *Butler* had failed to make an express finding of probable cause. The California Supreme Court held that the defendant could challenge the sufficiency of the evidence supporting the AIDS testing order on appeal, even without raising an objection in the trial court, because the enabling statute specifically required a finding of probable cause. (*Butler*, at p. 1126.) The court went on to caution, however, that its ruling was predicated both on the specific requirements of the statute, and the general principle that involuntary HIV/AIDS testing is strictly limited by statute. "For this reason, nothing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott* [(1994)] 9 Cal.4th 331, that absent timely objection *sentencing determinations are not reviewable on appeal* . . . ." (*Id.* at p. 1128, fn. 5, italics added.) Thus, a concurring justice in the *Butler* decision clarified the understanding that, "it remains the case that *other* sentencing determinations may not be challenged for the first time on appeal,

even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the defendant's ability to pay a fine [citations] . . . ." (*Id*. at p. 1130 (conc. opn. of Baxter, J.).) The decision in *Butler* therefore "confirms that, except for HIV testing ordered under Penal Code section 1202.1, [the California Supreme Court] generally will not extend the rules governing challenges to the factual sufficiency of criminal convictions or civil judgments to challenges to the factual sufficiency of orders made at sentencing. As the Court of Appeal has explained, '[a] challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of the evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial.' (*People v. Gibson* [(1994)] 27 Cal.App.4th [1466,] at pp. 1468-1469.)" (*Id*. at p. 1131 (conc. opn. of Baxter, J.).)

The California Supreme Court has granted review in one recent case, exemplifying the split in authority about the need to object in the trial court before raising on appeal the question of "sufficiency of the evidence" of, e.g., the defendant's ability to pay a booking fee. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, rev. granted June 29, 2011, S192513.)

We do not find it necessary to decide whether defendant's failure to object to the booking fee below resulted in forfeiture of the issue on appeal, or whether the "sufficiency of the evidence" is a claim for which no objection is necessary.

Here, defendant does raise a "sufficiency of the evidence" claim with respect to the booking fee, but the evidentiary claim does not involve his ability to pay the fee. The specific cases on which he relies involved "sufficiency of the evidence" concerning the defendant's ability to pay the booking fee. Those cases are not precisely in point. Defendant raises a rather different "sufficiency of the evidence" claim in this case: he focuses solely on the provisions of the fee-reimbursement statutes requiring that the fee not exceed the actual administrative costs of booking. Defendant argues there was no evidence in the record to show what the actual administrative costs were in this case. We reject this claim on the merits.

Defendant relies on *People v. Viray*, *supra*, 134 Cal.App.4th 1186, for the proposition that an order to pay a fee should be reversed when there was no evidence in the record concerning the actual cost to the county. This reliance is misplaced. *Viray* involved an order for reimbursement of counsel fees (to defray the cost of representation by the public defender), not booking fees. The deputy public defender himself was the one who brought the matter to the attention of the trial court, and to that extent was acting contrary to the interests of the client in requesting the court to require the defendant to reimburse counsel's own attorney fees. As to that issue, therefore, the defendant was effectively unrepresented, and could not be expected to assert her own interests in the face of counsel's request otherwise. Under those unique circumstances, the court understandably found the failure to object did not forfeit the claim that the evidence was insufficient to show the actual costs to the county of the public defender's representation. (*Id.* at p. 1216.) The deputy public defender had

submitted what amounted to a bill claiming a rate of $200 an hour as the multiplier for the fees to be reimbursed, but no one had submitted a declaration or other evidence as to the actual cost to the county of the representation provided. (*Id*. at p. 1217.) There was no authoritative source referenced to establish what those actual costs were.

Here, however, the components of the actual costs to the county are prescribed by statute and governed by an entire scheme of hearings and evidence whenever any change to the costs to be charged is contemplated.

Government Code section 29550, subdivision (a), provides in relevant part:

"(a)(1) Subject to subdivision (d) of Section 29551, a county may impose a fee upon a city, special district, school district, community college district, college, or university for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city, special district, school district, community college district, college, or university, where the arrested persons are brought to the county jail for booking or detention. The fee imposed by a county pursuant to this section shall not exceed the actual administrative costs, including applicable overhead costs as permitted by federal Circular A-87 standards, as defined in subdivision (d), incurred in booking or otherwise processing arrested persons. For the 2005-06 fiscal year and each fiscal year thereafter, the fee imposed by a county pursuant to this subdivision shall not exceed one-half of the actual administrative costs, including applicable overhead costs as permitted by federal Circular A-87 standards, as defined in subdivision (d), incurred in booking or otherwise processing arrested persons. A county may submit an invoice to a city,

special district, school district, community college district, college, or university for these expenses incurred by the county on and after July 1, 1990. Counties shall fully disclose the costs allocated as federal Circular A-87 overhead.

"(2) Any increase in a fee charged pursuant to this section shall be adopted by a county prior to the beginning of its fiscal year and may be adopted only after the county has provided each city, special district, school district, community college district, college, or university 45 days written notice of a public meeting held pursuant to Section 54952.2 on the fee increase and the county has conducted the public meeting."

Government Code section 29550, subdivision (e), prescribes the components which may be included in actual costs: "(e) As used in this section, 'actual administrative costs' include only those costs for functions that are performed in order to receive an arrestee into a county detention facility. Operating expenses of the county jail facility including capital costs and those costs involved in the housing, feeding, and care of inmates shall not be included in calculating 'actual administrative costs.' 'Actual administrative costs' may include the cost of notifying any local agency, special district, school district, community college district, college or university of any change in the fee charged by a county pursuant to this section. 'Actual administrative costs' may include any one or more of the following as related to receiving an arrestee into the county detention facility:

"(1) The searching, wristbanding, bathing, clothing, fingerprinting, photographing, and medical and mental screening of an arrestee.

"(2) Document preparation, retrieval, updating, filing, and court scheduling related to receiving an arrestee into the detention facility.

"(3) Warrant service, processing, and detainer.

"(4) Inventory of an arrestee's money and creation of cash accounts.

"(5) Inventory and storage of an arrestee's property.

"(6) Inventory, laundry, and storage of an arrestee's clothing.

"(7) The classification of an arrestee.

"(8) The direct costs of automated services utilized in paragraphs (1) to (7), inclusive.

"(9) Unit management and supervision of the detention function as related to paragraphs (1) to (8), inclusive."

Government Code section 29550, subdivision (d), provides: "(d) When the court has been notified *in a manner specified by the court* that a criminal justice administration fee is due the agency:

"(1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt.

"(2) The court shall, as a condition of probation, order the convicted person, based on his or her ability to pay, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Italics added.)

These provisions, all taken together, demonstrate that the determination of a county's "actual administrative costs" for booking an arrestee is a matter undertaken by the county as a matter of public record, and not a matter subject to trial in the criminal courts. The scheme specifies which components the county may include in its calculation of the "actual administrative costs." The statutes cross-reference other governmental publications for standards pertaining to overhead costs. It provides for notice to affected agencies, and for consideration and determination of the issue in a public meeting whenever the county wishes to increase its actual administrative costs for booking. The county "adopts" such changes after the public meeting; i.e., it engages in legislative fact-finding and enactment by legislation or regulation. Once the level of the fee has been so determined, the county may impose the fee on local agencies by submitting an invoice.

With respect to court orders for reimbursement of booking fees, the statutory scheme calls upon the agency to notify the court "in a manner specified by the court." Nothing in the record demonstrates that the agency here (the county) failed to notify the court "in a manner specified by the court." Rather, the presumption is that official duties have been regularly performed. (Evid. Code, § 664.) The probation officer was apprised of the county's regular request for booking fee reimbursement, as an order for the booking fee was included in the proposed conditions of probation, as required pursuant to Government Code section 29550, subdivision (d)(2).

We reiterate that defendant here raises no claim as to the insufficiency of the evidence concerning his ability to pay the booking fee. His "insufficiency of the

evidence" claim relates solely to the evidence of the county's "actual administrative costs."

Our first duty in construing the statute is to ascertain and effectuate the intention of the Legislature. (See *People v. Bautista* (2008) 163 Cal.App.4th 762, 774.) We highly doubt that the Legislature intended, after every criminal conviction, that the court should conduct a mini-trial to satisfy each defendant of the sufficiency of the evidence of an arresting agency's "actual administrative costs," before imposing any booking fee orders. Clearly, the Legislature contemplated that the evidence of "actual administrative costs" is to be considered, and the factual matter to be determined and set by, the agencies themselves. The "evidence" of such "actual administrative costs" vis-à-vis the criminal courts is a matter of notice of that determination by the relevant agency. The court must be notified in a manner specified by the court. (Gov. Code, § 29550, subd. (d)(1).) Again, presumably, such notice was given here, inasmuch as the probation report contained a prospective order for the booking fee as a condition of probation, in the amount of $414.45. Even though the trial court ultimately did not grant probation, the probation report contains sufficient evidence of the currently-set amount of the county booking fee to support an order imposing the booking fee on defendant, a convicted offender. The determination of the "actual administrative costs" of the booking fee is, as a matter of statute, confided to the agency itself.

DISPOSITION

The matter is remanded with directions to the trial court to recalculate defendant's custody credits, awarding defendant one additional day of actual custody credit. The court is further directed to issue an amended abstract of judgment reflecting the corrected custody credits and to transmit a copy to the California Department of Rehabilitation and Corrections. Otherwise, defendant's contention that the evidence was insufficient to support the booking fee order is rejected on the merits, and the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.